86-818

Supreme Court, U.S.
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No.

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

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FALCON INSURANCE COMPANY

and

MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY,
*Petitioners*

v.

ELI LILLY AND COMPANY,
*Respondent*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTION PRESENTED

Whether the exercise of personal jurisdiction by the United States District Court for the District of Columbia over nonresident insurance companies (who neither transact nor do business in the District of Columbia) in a diversity action brought by their nonresident insured, seeking a declaration of rights under its insurance policies (none of which was negotiated, transacted, executed or delivered in the District), is repugnant to the Due Process Clause of the Fifth Amendment to the United States Constitution, where such jurisdiction is based not on a consideration of the insurance companies' contacts with the District of Columbia, but solely on the imputation to such insurance companies of the insured's presumed contacts there.

## PARTIES TO THE PROCEEDING

The petitioners are:

(i) Falcon Insurance Company, which is a subsidiary of The Northern Assurance Company of America, which is, in turn, wholly owned by Commercial Union Corporation, a Delaware insurance holding company; and

(ii) Mutual Fire, Marine and Inland Insurance Company, which has the following subsidiaries or affiliates: Rhine Reinsurance Company, Ltd., UMI Holdings, Inc., First New York Syndicate Corporation, and UMI Underwriters, Inc.

The respondent is Eli Lilly and Company.

There are numerous additional parties to the proceeding below that have no involvement in the issues here presented. The Home Insurance Company and others, including the petitioners herein, have petitioned this Court for a writ of certiorari to review the judgment of the court below on grounds other than the personal jurisdiction issues involved here. *Home Insurance Co., et al. v. Eli Lilly and Co.*, petition for writ of certiorari filed November 20, 1986. The petition in that case includes a list of all parties to the proceedings below, and petitioners herein adopt that list of parties and incorporate it into this petition by reference.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 24, 1986.

## OPINIONS BELOW

The full opinion of the court below, reported at 794 F.2d 710 (D.C. Cir. 1986), is reproduced in the Appendix hereto, 1a-23a. (Only pages 19a-21a thereof deal with the question presented by this petition.) The August 22, 1986, order of the court below denying rehearing is also reproduced in the Appendix, 24a-25a. The unreported Order of the United States District Court for the District of Columbia dated October 6, 1982, denying petitioners' motions to dismiss for lack of *in personam* jurisdiction

and for improper venue is reproduced in the Appendix, 26a.

## JURISDICTION

The judgment of the court below was entered on June 24, 1986. Petitioners timely filed a petition for rehearing which was denied on August 22, 1986. App., 24a-25a. This petition for a writ of certiorari was filed November 20, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in pertinent part, provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The District of Columbia Code, § 13-423 (1981 & Supp. IV 1986), in pertinent part, provides:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—
>
> > (6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing . . . .
>
> (b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

## STATEMENT OF THE CASE

In 1982, Eli Lilly and Company ("Lilly") brought a declaratory judgment action in the United States District Court for the District of Columbia against 267 in-

surance companies who, at some time during the period from 1942 to 1976, had provided Lilly with comprehensive general liability insurance coverage. Among the defendants named in that suit were Falcon Insurance Company ("Falcon") and Mutual Fire, Marine and Inland Insurance Company ("Mutual Fire")—the petitioners herein. Jurisdiction of the District Court was invoked under 28 U.S.C. § 1332(a).

Lilly was once a major manufacturer of DES (diethylstilbestrol), a drug that had often been prescribed to pregnant women to help prevent miscarriages. In recent years, claims have been asserted that DES has caused cancer and other disorders in DES users' daughters who were *in utero* when the drug was taken. As a result, Lilly has been named as a defendant in approximately 650 tort actions involving DES claims. Because of an alleged dispute with its insurers as to when coverage for DES claims was invoked or "triggered" under its comprehensive general liability policies, Lilly brought suit in the District of Columbia for a judicial determination of coverage. Specifically, Lilly sought a declaration that coverage was triggered by the ingestion of DES, and by the manifestation of injury, and at each point in between—a so-called multiple trigger of coverage. By suing in the District of Columbia, Lilly sought to avail itself of the D.C. Circuit's decision in *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (White, Blackmun, Powell, J.J. dissenting), in which the multiple trigger concept had been applied to asbestos exposure claims.[1]

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[1] On the initial appeal from the District Court, the court below certified several legal questions to the Supreme Court of Indiana and reserved decision on petitioners' personal jurisdiction and venue objections. *Eli Lilly and Co. v. Home Insurance Co.*, 764 F.2d 876, 884-885 (D.C. Cir. 1985). The Supreme Court of Indiana found that, given the language contained in the Lilly policies, the multiple

Lilly is an Indiana corporation with its principal place of business in Indianapolis. Petitioner Falcon is a Delaware corporation with its principal place of business in Boston, Massachusetts and petitioner Mutual Fire is a Pennsylvania corporation with its principal place of business in Philadelphia.

Neither Falcon nor Mutual Fire is licensed to do business in the District of Columbia. Both are non-admitted surplus lines carriers and, as such, are not authorized to transact business in the District. Under D.C. Code §§ 35-1543 and 1544, a D.C. broker is prohibited from placing any coverage with non-admitted surplus lines carriers unless the broker "is, after diligent effort, unable to procure such policies . . . from companies duly authorized to transact business in the District." D.C. Code § 35-1544 (1981). Thus, the procurement of a policy from non-admitted surplus lines insurers like Mutual Fire and Falcon occurs as a matter of last resort and only at the initiation of an independent surplus lines broker acting on behalf of an insured who is unable to obtain the coverage from a D.C.-authorized insurer.

Not only are Mutual Fire and Falcon not authorized to transact business in the District of Columbia, they have no employees, agents, or brokers there, nor any office, telephone listing, property, or bank account. Neither insurer solicits business in the District of Columbia or transacts or does business there. The only premiums petitioners derive from insureds residing in the District

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trigger theory introduced in *Keene* was Indiana law. *Eli Lilly and Co. v. Home Insurance Co.*, 482 N.E.2d 467, 470-471 (Ind. 1985). Neither the merits of Lilly's trigger-of-coverage claims nor the decisions of the court below relating thereto are involved in this petition. The Home Insurance Company and other Lilly insurers, including petitioners herein, have petitioned this Court for a writ of certiorari seeking review of the judgment of the court below on grounds other than the personal jurisdiction issues here presented. *See Home Insurance Co., et al. v. Eli Lilly and Co.*, petition for writ of certiorari filed November 20, 1986.

come exclusively from the surplus lines policies above described, and these premiums have no relationship to Lilly, the policies issued to it by petitioners, or this lawsuit.

Falcon issued three policies to Lilly from 1960-1968. Mutual Fire insured Lilly for one year from 1975-1976. These policies, which provided only excess liability insurance coverage, were exclusively transacted between the Indianapolis-based Lilly, or its Indianapolis-based broker Marsh & McLennan, Inc., on the one hand, and Mutual Fire in Philadelphia or Falcon in Boston, on the other. None of these policies was negotiated, transacted, executed or delivered in the District of Columbia. No premiums thereunder came from the District, and Lilly's suit against petitioners did not relate in any way to any alleged conduct by petitioners in the District of Columbia. Finally, it is undisputed that, under the policies they issued to Lilly, Falcon and Mutual Fire have no duty to defend actions brought against Lilly in the District of Columbia or anywhere else.

Given this dearth of contacts with the District of Columbia, petitioners timely moved the District Court to dismiss the complaint against them for lack of personal jurisdiction and improper venue. These motions were denied. App., 26a. On appeal, the court below affirmed, concluding that the exercise of personal jurisdiction over petitioners was consistent with the due process clause of the Constitution.[2]

The stated "touchstone" of the court's due process inquiry was whether it was "foreseeable" that Falcon and Mutual Fire would be "haled into court" in the District

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[2] While the court below discussed the implications of the consent to suit clauses in petitioners' insurance policies, the court correctly concluded that these clauses provided no basis for personal jurisdiction over petitioners. App., 14a-19a. Thus, the decision below rests squarely on the constitutionality of the District Court's exercise of personal jurisdiction over petitioners. App. 19a-21a.

of Columbia, citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). App., 20a. The court found that, given the specific relationship between Lilly and petitioners, such a result was "quite foreseeable." *Id.* The court reached this conclusion not by analyzing what, if any, contacts petitioners themselves had with the District of Columbia, but by looking instead to *Lilly's* presumed contacts there, and then imputing these contacts to petitioners:

> [Petitioners] knew that their insured, Lilly, distributed its products nationwide. They therefore were aware that Lilly was likely to be sued in any jurisdiction in the nation, including the District of Columbia. Moreover, as Lilly's insurers, [petitioners] were aware that if Lilly was sued it was likely to attempt to implead [petitioners] if a dispute arose over their duty to indemnify or defend. . . . In such an eventuality it would be completely foreseeable that the insured would successfully hale the insurance company into court.

App., 20a (citations omitted).

The court below found that it was also foreseeable that petitioners could be sued in the District of Columbia because the court assumed that petitioners possessed considerable information about the scope and extent of Lilly's business operations and had structured their insuring agreements accordingly. App., 20a-21a. The court noted with approval what it termed "the First Circuit's rule" that, because insurance companies have a commercial interest in knowing of the contacts of their insureds with the forum state, "an insurer should foresee being sued in a jurisdiction where its insured has substantial contacts." App., 21a (citing *American & Foreign Insurance Association v. Commercial Insurance Co.*, 575 F.2d 980 (1st Cir. 1978) and *Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981)). The court concluded:

> In this case there can be no question but that Eli Lilly's insurers were aware of the nation-wide scope of Lilly's product distribution. They cannot now claim that it was somehow unforeseeable that they would be haled into court in a jurisdiction where Lilly would likely be subject to suit.

App., 21a (footnote omitted).

Falcon and Mutual Fire timely petitioned the court below for rehearing. They pointed out that the court had erred in finding that petitioners could have foreseen being haled into court by impleader in a hypothetical suit brought by third persons against Lilly in the District of Columbia. Petitioners explained that such an eventuality was not foreseeable because it was *impossible* that Lilly could have impleaded petitioners into any such suit.[3] Petitioners also pointed out that the court's foreseeability finding under the so-called "First Circuit rule" was flawed because the court had simply assumed, without basis, that petitioners possessed considerable knowledge and information about Lilly's alleged activities in the District of Columbia and had structured their insurance policies accordingly. Finally, petitioners demonstrated that, in any event, it was plainly unconstitutional to rely on Lilly's presumed unilateral contacts with the District of Columbia to maintain personal jurisdiction over petitioners. Nevertheless, the court below, by Order dated August 22, 1986, denied the petition for rehearing. App., 24a-25a.

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[3] *See* p. 11 n.5, *infra*.

## REASONS FOR GRANTING THE WRIT

### I. The Exercise Of *In Personam* Jurisdiction By The United States District Court For The District Of Columbia Over A Nonresident Surplus Lines Insurer In An Action Brought By Its Insured, Based Solely On The Insured's Contacts With The District Of Columbia, Violates The Due Process Clause.

#### A. Petitioners Did Not Purposefully Avail Themselves Of The Privilege Of Conducting Business In The District Of Columbia So As To Invoke The Benefit And Protection Of Its Laws.

It is well-settled that a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist minimum contacts between the defendant and the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

> [I]t is essential in each case that there be some act by which the defendant *purposefully avails itself* of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

*Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (emphasis added; citation omitted); *Kulko v. California Superior Court*, 436 U.S. 84, 94 (1978).

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), this Court reaffirmed these principles and held unconstitutional an Oklahoma court's exercise of personal jurisdiction over nonresident defendants in circumstances similar to the instant case. There, the fortuitous presence of an automobile in Oklahoma was found constitutionally insufficient, by itself, to support personal jurisdiction over its nonresident vendors in a products liability suit involving the automobile:

> [W]e find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction.

*Id.* at 295. The Court stated that the "purposeful availment" requirement is not met by "isolated" sales, but "arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States." *Id.* at 297.

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174 (1985), this Court again reiterated that "[t]his 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts," or as a result "of the 'unilateral activity of another party or a third person.'" *Id.* at ——, 105 S.Ct. at 2183 (citations omitted). Instead, the court must find that "the defendant has 'purposely directed' his activities at residents of the forum." *Id.* at ——, 105 S.Ct. at 2182 (citations omitted).

In *Burger King*, the Court held that the Florida courts had personal jurisdiction over a Michigan-based Burger King franchisee in an action arising out of the franchise relationship. In that case, the governing contracts provided that they were established in Florida, the home of the Burger King corporation, and governed by Florida law, and called for the payment of all fees and the forwarding of all relevant notices to the Florida headquarters. *Id.* at ——, 105 S.Ct. at 2178. The Court emphasized that the defendant had "entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida" and that "[i]n light of [defendant's] voluntary acceptance of the long-term and exacting regulation of his business from [Florida], the 'quality and nature' of his relationship to the company in Florida can in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.'" *Id.* at ——, 105 S.Ct. at 2186 (citations omitted).

The record in the instant case is entirely devoid of the "affiliating circumstances" or "purposeful availment" constitutionally required to subject either Falcon or Mutual Fire to personal jurisdiction in the District of Columbia.

Falcon is a Delaware corporation with its principal place of business in Massachusetts. Mutual Fire is a Pennsylvania corporation with its principal place of business there. Neither Falcon nor Mutual Fire is authorized or licensed to transact business in the District of Columbia. Neither company solicits or does business there. They have no employees, agents, brokers, offices, telephone listings, property, or bank accounts in the District of Columbia. They have never contracted directly with any insureds residing in the District of Columbia. Finally, Lilly's insurance policies involved in this case were not negotiated, transacted, executed or delivered in the District.

The only relationship of any kind that these petitioners have had with the District of Columbia is their passive receipt of surplus lines business from independent brokers acting on behalf of insureds unable to obtain particular insurance coverage from D.C.-authorized insurers. None of these premiums relate in any way to Lilly or to Lilly's lawsuit and, in any case, were not relied upon by the court below in upholding the District Court's exercise of personal jurisdiction over petitioners.[4]

Under these circumstances, to require Falcon and Mutual Fire to appear and defend actions brought against them in the District of Columbia is unfair, unreasonable, and unconstitutional.

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[4] The court below was correct in disregarding, for the purposes of its jurisdictional analysis, any premiums unrelated to the Lilly policies since "jurisdiction [under the District of Columbia long arm statute] is limited to claims arising from the particular transaction of business which provides the basis for jurisdiction." *Cohane v. Arpeja-California, Inc.*, 385 A.2d 153, 158 (D.C. 1978), *cert. denied*, 439 U.S. 980 (1978).

### B. Imputing Their Insured's Presumed District Of Columbia Contacts To Petitioners In Order To Exercise *In Personam* Jurisdiction Over Them Violates The Due Process Clause Of The Constitution.

Ignoring the utter absence of petitioners' contacts with the forum, the court below found that it was foreseeable, and therefore constitutionally permissible, that Lilly could maintain suit against petitioners in the District of Columbia. The court reached this result by first looking to Lilly's presumed contacts with the District and concluded that they were sufficient to render Lilly amenable to suit there by others. The court then assumed that petitioners were aware that, if Lilly was sued, it was likely to attempt to implead petitioners if a dispute arose over their duty to indemnify or defend.[5] The court

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[5] Petitioners do not agree that such a possibility of impleader is constitutionally sufficient to support the exercise of personal jurisdiction over them. In any case, impleader of these petitioners by Lilly was impossible and, therefore, not foreseeable. Impleader was impossible because the only two legal bases therefor—the refusal by petitioners to indemnify or to defend Lilly—did not exist. *See National Mutual Insurance Co. v. Liberty Mutual Insurance Co.*, 196 F.2d 597 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 819 (1952); *Green v. Shepherd Construction Co.*, 46 F.R.D. 434, 438 (N.D. Ga. 1969); Wright & Miller, *Federal Practice and Procedure*: Civil § 1449 at 267 (1971). The court below found that Mutual Fire had not refused to indemnify Lilly and said that it was unable to find on the facts before it that Falcon had so refused. App., 18a-19a. And it is undisputed that petitioners have no duty under their policies to defend Lilly in the District of Columbia or anywhere else. Indeed, as Lilly explained in its main brief in the court below, it prefers that *none* of its insurers has a duty to defend:

> Most initial layer products liability policies are "duty to defend" policies, *i.e.*, the insurer is obliged to supply a defense lawyer in the underlying cases. Lilly prefers to conduct its own defense and send the insurers the bill. As a result of this arrangement, Lilly has excess "indemnity" policies at its initial layer of insurance, rather than the usual primary "duty to defend" policies.

Brief of Eli Lilly and Co., filed December 13, 1984, at p. 10 (footnote omitted).

concluded: "In such an eventuality it would be completely foreseeable that the insured would successfully hale the insurance company into court." App., 20a.

The court offered another reason why it believed it was foreseeable that petitioners would be sued in the District of Columbia. Here, the court presupposed that insurance companies in general have considerable information about the companies they insure, and structure their policies and set their premiums accordingly. The court concluded that, because insurance companies have a commercial interest in knowing of the contacts of their insureds with the forum state, "an insurer should foresee being sued in the jurisdiction where its insured has substantial contacts." App., 21a. And relying again on its presumption that Lilly had sufficient contacts with the District of Columbia so as to be amenable to suit there, the court concluded that petitioners should have foreseen being haled into a jurisdiction where Lilly would likely have been subject to suit. *Id.*

This imputation to petitioners of Lilly's presumed contacts with the District of Columbia in order to exercise *in personam* jurisdiction over petitioners cannot be squared with due process. The proper touchstone for determining the constitutionality of a forum's exercise of personal jurisdiction is an examination of the *defendant's*—not someone else's—contacts with that forum. *See, e.g., Kulko*, 436 U.S. at 93; *Hanson*, 357 U.S. at 253; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

As this Court said in *World-Wide Volkswagen*:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the *defendant's conduct and connection with the forum State* are such that he should reasonably anticipate being haled into court there.

444 U.S. at 297 (emphasis added) (citing *Kulko*, 436 U.S. at 97-98 and *Shaffer*, 433 U.S. at 216). The Court explained:

> The Due Process Clause, by ensuring the "orderly administration of the laws," . . . gives a degree of predictability to the legal system that allows potential defendants to structure *their primary conduct* with some minimum assurance as to where that conduct will and will not render them liable to suit.

*World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added).

Although in that case it was foreseeable, as a matter of fact, that petitioners' automobiles might end up in any state, including Oklahoma, the Court emphasized that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction." *Id.* at 295. The Court, quoting *Hanson*, 357 U.S. at 253, observed that the Constitution requires more:

> [T]he mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."

*World-Wide Volkswagen*, 444 U.S. at 298; *accord Helicopteros*, 466 U.S. at 417.[6]

In *Burger King*, this Court recently reaffirmed that jurisdiction is proper only "where the contacts [relied upon for jurisdiction] proximately result from actions by the defendant *himself* that create a 'substantial con-

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[6] The District of Columbia Court of Appeals recently relied on the above-quoted language of this Court in *Hanson*, *World-Wide Volkswagen* and *Helicopteros* in holding that D.C. Code § 13-423, the long arm statute upon which the court below relied, did not provide a basis for personal jurisdiction over a defendant whose only business contacts with the District of Columbia took place at the initiation of the plaintiff or a third party. *Sol Salins, Inc. v. Sure Way Refrigerated Truck Transportation Brokers, Inc.*, 510 A.2d 1032, 1034-35 (D.C. 1986).

nection' with the forum State." 471 U.S. at ——, 105 S.Ct. at 2183-84 (emphasis in original).

In judging whether a party has sufficient minimum contacts such that personal jurisdiction can be constitutionally exercised over that party, a court must focus on "the relationship among the defendant, the forum, and the litigation." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (quoting *Shaffer*, 433 U.S. at 204); *accord Helicopteros*, 466 U.S. at 414. Indeed, an approach like that taken by the court below, which would "shift the focus of the inquiry from the relationship among the defendant, the forum, and the litigation to that among the plaintiff, the forum, the insurer, and the litigation . . . is forbidden by International Shoe and its progeny." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). *See also Helicopteros*, 466 U.S. at 412 n.5 (Nothing in the relationship between a plaintiff and defendant "could possibly enhance [the defendant's] contact with [the forum]").[7]

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[7] Unlike the court below, other Courts of Appeals have followed this Court's rule and have focused their personal jurisdiction analyses on the *defendant's* contacts with the forum, not the plaintiff's contacts with the forum or the plaintiff's contacts or contractual relationship with the defendant. *See, e.g., Hunt v. Erie Insurance Group*, 728 F.2d 1244, 1247 (9th Cir. 1984) (Court held that insured's contacts with California could not be imputed to its insurer because "[t]o characterize [the insured's] decision [to move to California] as an intentional action by [the insurer], for purposes of meeting the purposeful availment requirement of due process, would frustrate the very policy behind that requirement: ensuring that a '*defendant's* conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'") (emphasis in original; citations omitted); *Travelers Indemnity Co. v. Calvert Fire Insurance Co.*, 798 F.2d 826, 833 (5th Cir. 1986); *Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 792 F.2d 989, 993 (11th Cir. 1986); *Colwell Realty Investments, Inc. v. Triple T Inns of Arizona, Inc.*, 785 F.2d 1330, 1333 (5th Cir. 1986); *Chung v. NANA Development Corp.*, 783 F.2d 1124, 1127 (4th Cir. 1986).

The two First Circuit decisions upon which the court below relied are inapposite. It is clear from a reading of those cases that the circumstances leading the First Circuit to uphold Puerto Rico's exercise of personal jurisdiction over the insurers there were far different from the circumstances presented here.

In *American & Foreign Insurance Association*—a case decided before *World-Wide Volkswagen*—the First Circuit affirmed Puerto Rico's exercise of jurisdiction over two Colombian insurers. These companies had insured a large volume of bottles shipped to Puerto Rico by a Colombian manufacturer. One of the bottles exploded, causing injury in Puerto Rico and giving rise to the lawsuit. The court found that the bottles "constituted a substantial subject of insurance located in Puerto Rico." 575 F.2d at 982. The court further emphasized that "[t]he insurance companies knew that they were covering the product liability risk arising from these bottles 'since *the terms of the policy assured full knowledge of both the volume of export sales as well as the actual location of the customers.*' " *Id.* (emphasis added).

Similarly, in *S.S. Zoe Colocotroni*, the First Circuit found that the insurance company "plainly knew" that the vessels it insured regularly stopped in Puerto Rico, that the insurer, through its agents in Puerto Rico, provided "substantial" insurance-related services to its customers there through a local correspondent, and that the insurer had, in fact, advertised to its customers that these services were available to them in Puerto Rico. 628 F.2d at 668. In these circumstances, the court concluded that the insured was "unavoidably aware that it was responsible to cover losses arising from a subject of insurance regularly present in Puerto Rico . . . ." *Id.* at 669.

The specificity of the First Circuit's findings in both of these cases stands in marked contrast to the generalized and unsubstantiated assumptions offered by the court below to justify the exercise of personal jurisdiction over

the petitioners here. But there is an even more fundamental and compelling reason why these cases have no application to the instant case. Both of the First Circuit cases were decided under Puerto Rico law. Puerto Rico is a so-called "direct action" jurisdiction in which injured parties are permitted at their option to bypass suing the alleged tortfeasor and instead bring an action directly against the tortfeasor's insurer. *See* 26 L.P.R.A. § 2003 (1976).

In *American & Foreign Insurance Association*, the court implicitly recognized the significance of a direct action statute in a forum's exercise of personal jurisdiction. 575 F.2d at 982. Moreover, in *S.S. Zoe Colocotroni*, the court made plain that Puerto Rico's status as a direct action jurisdiction bore directly on the foreseeability that the insurers might be sued there and was an essential element of its affirmance of personal jurisdiction over the insurers:

> [The insurer] was unavoidably aware that it was responsible to cover losses arising from a substantial subject of insurance regularly present in Puerto Rico, *a direct action jurisdiction.*
>
> * * * * *
>
> Where, as here, the insurer has the means available to structure its primary conduct so as to control the area *within which it will be subject to direct action*, where it is undoubtedly aware that the objects of its policies are regularly present in a particular jurisdiction, and where it not only does not act to curtail such presence but actively promotes it by providing contractual services in the jurisdiction, we hold that such an insurer is amenable to personal jurisdiction in the forum.

628 F.2d at 670 (emphasis added; footnote omitted).

Unlike Puerto Rico, the District of Columbia has no provision of law providing for direct action against insurers.

This Court has never held that an insured's conduct in the forum state may, in and of itself, constitute a sufficient basis for exercising personal jurisdiction over its insurer. Indeed, in the converse situation presented in *Rush*, 444 U.S. at 331-32, this Court found *unconstitutional* the exercise of personal jurisdiction over a nonresident insured based on his insurer's contact with the forum. Rejecting the notion that the insured was present in the forum merely because its insurer was obligated by contract to defend it there, the Court stated that "the fictitious presence of the insurer's obligation in Minnesota does not, without more, provide a basis for concluding that there is *any* contact in the International Shoe sense between Minnesota and the insured." *Id.* at 329-30 (emphasis in original).[8] Finally, the Court stated:

> The Minnesota court also attempted to attribute [the insurer's] contacts to [the insured] by . . . aggregating their forum contacts in determining whether it had jurisdiction. The result was the assertion of jurisdiction over [the insured] based solely on the activities of [the insurer]. *Such a result is plainly unconstitutional. Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of International Shoe, however, must be met as to each defendant over whom a state court exercises jurisdiction.*

*Id.* at 331-32 (emphasis added; footnote omitted).

The same principle must apply in the instant case. Lilly's contacts with the District of Columbia, whatever they may be, cannot constitutionally support the exercise of personal jurisdiction over petitioners here.

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[8] Although *Rush* was a *quasi in rem* action, the Court acknowledged "that 'all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.' " 444 U.S. at 327 (citing *Shaffer*, 433 U.S. at 212).

**II. The Decision Of The Court Below Directly Conflicts With A Decision Of The Highest Court Of The Commonwealth Of Pennsylvania.**

The decision of the court below directly conflicts with the holding of the Supreme Court of Pennsylvania in *United Farm Bureau Mutual Insurance Co. v. U.S.F. & G.*, 462 A.2d 1300 (Pa. 1983). In *United Farm Bureau*, the Pennsylvania court refused to permit the assertion of personal jurisdiction over a nonresident insurer despite the fact that its insured (the plaintiff) was present in the forum state and its insurance policy covered losses wherever they might arise nationwide. The Pennsylvania long arm statute involved in the case was in all relevant respects identical to the District of Columbia long arm statute involved in the instant case. *Id.* at 1304. The court concluded:

> Assuming United Farm under its liability policy insured a risk located within this Commonwealth when it issued the policy, nevertheless the risk was limited by its promises to defend its insureds and indemnify them in suits against the insureds, *not itself*, for damages arising out of the insureds' liability for claims . . . . *Thus, it insured only the risk of paying those sums which its insureds become obligated to pay. Such a promise to defend and pay judgments does indeed extend to the entire United States . . . . The policy does not, however, require United Farm to submit itself to the jurisdiction of a foreign state as a defendant in its own person.*

*Id.* at 1306-07 (emphasis added).

In *United Farm Bureau*, as in the instant case, there was no evidence of any substantial contacts by the insured or the insurer with the forum. Since the insurer lacked any contact with the forum in its own right and had no particular knowledge of the insured's contacts there, the court refused to permit the exercise of per-

sonal jurisdiction. Unlike the insurer in *United Farm Bureau*, petitioners here have no duty whatsoever to defend Lilly. *See* p. 11 n.5, *supra*. Thus, the court below has affirmed the exercise of personal jurisdiction over petitioners in a setting even more tenuous than that presented in *United Farm Bureau*.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX

## UNITED STATES COURT OF APPEALS
## DISTRICT OF COLUMBIA CIRCUIT

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No. 84-5391

ELI LILLY AND COMPANY

v.

HOME INSURANCE COMPANY, *et al.*,
FIREMEN'S FUND INSURANCE COMPANY,
*Appellant.*[1]

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June 24, 1986

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Appeals from the United States District Court
for the District of Columbia

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[1] Consolidated with the following cases (identified by this court's case number and appellant(s)), in all of which Eli Lilly & Company is the appellee: 84-5394, Zurich American Insurance Company; 84-5395, International Surplus Lines Insurance Company *et al*; 84-5396, Interstate Fire & Casualty Company *et al.*; 84-5397, American Employers' Insurance Company; 84-5398, Falcon Insurance Company; 84-5399, Mutual Fire, Marine & Inland Insurance Company; 84-5400, St. Paul Fire & Marine Insurance Company; 84-5401, American Home Assurance Co. *et al.*; 84-5402, Insurance Company of North America *et al.*; 84-5403, American Motorists Insurance Company *et al.*; 84-5404, Aetna Casualty & Surety Company *et al.*; 84-5405, Allan Peter Denis Haycock and Paul Malcolm Johnson *et al.*; 84-5406, Home Insurance Company; and 84-5407, Travelers Indemnity Company.

Following Remand from the Supreme Court of Indiana
(D.C. Civil Action No. 82-669)

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George Marshall Moriarty, Kenneth W. Erickson, Boston, Mass., Michael Nussbaum, Earl C. Dudley, Jr., Dennis M. Flannery, A. Stephen Hut, Jr., Washington, D.C., Sheila L. Birnbaum, New York City, Lawrence E. Carr, Jr., James F. Lee, Jr., Washington, D.C., James E. Rocap, III, Indianapolis, Ind., Stephen L. Nightingale, Washington, D.C., James P. Schaller, M. Elizabeth Medaglia, Brendan V. Sullivan, Jr., John J. Buckley, Jr., R. Harrison, Pledger, William John Hickey, Jr., Richard H. Gimer, Brian C. Shevlin, James C. Gregg and James E. Greene were on the supplemental brief following remand for appellants.

Theodore B. Boehm, Indianapolis, Ind., Christopher G. Scanlon, Ralph Earle, II, and Michael A. Nardolilli, Washington, D.C., were on the supplemenal brief following remand for appellee.

Before EDWARDS and SCALIA, Circuit Judges, and WRIGHT, Senior Circuit Judge.[2]

Opinion for the court filed by Senior Circuit Judge WRIGHT.

J. SKELLY WRIGHT, Senior Circuit Judge:

In *Eli Lilly & Co. v. Home Ins. Co.*, 764 F.2d 876 (D.C.Cir.1985) (*Eli Lilly I*), this court certified several legal questions to the Supreme Court of Indiana concerning the scope of insurance coverage for the manufacturer of the drug DES. The Indiana court having issued an

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[2] Judge Tamm, a member of the panel of this court that issued the certification decision, died before the Indiana Supreme Court remanded the case to this court. Judge Scalia was selected to replace Judge Tamm following the Indiana court's remand. Judge Wald subsequently recused herself and was replaced by Judge Edwards.

opinion answering our questions, the case is once again before us. The Indiana court held that under Indiana law extrinsic evidence would not be considered in construction of an ambiguous term in an insurance contract. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467 (Ind. 1985). It further held that in the case of the contract before this court "coverage is triggered at any point between ingestion of DES, and the manifestation of a DES-related disease." *Id.* at 470-471. These holdings dictate affirmance of the order of the District Court granting appellee's summary judgment motion on its declaratory claim.[3]

## I. Background

### A. *The DES Dispute*

From the late 1940's until 1971 doctors often prescribed the drug DES (diethylstilbestrol) to pregnant women to help prevent miscarriages. In 1970, however, researchers reported a connection between ingestion of DES and development of cancers in the DES users' daughters who were *in utero* at the time the drug was taken. Massive tort litigation followed, much of it against appellee Eli Lily, one of the largest manufacturers of DES.[4]

From the time it first produced DES until 1976 Eli Lilly purchased some 242 insurance policies to cover its DES risks. All of these policies provided that the insurer would indemnify Lilly for its tort liabilities if the underlying tort suit were based on an "injury" that

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[3] In *Eli Lilly I* this court reserved decision on the personal jurisdiction and venue objections of three excess insurance companies. We now address these objections and find them without merit. *See* Part IV *infra*.

[4] Lilly manufactured DES from 1947 to 1967. Over 600 lawsuits have been filed against Lilly for DES-related illnesses.

occurred during the policy period.[5] The term "injury" is not defined with precision in the policies themselves. *See* 2 Joint Appendix (JA) 96. Nor is the time at which injury "occurs" self-evident. Given that cancer often only develops when a DES daughter is between 15 and 25 years of age, Memorandum Opinion filed April 12, 1984 (Mem.Op.) at 4 n. * * * (D.D.C. Civil Action No. 82-669), 5 JA 697, it was not unusual for several insurance companies to have issued insurance policies to Lilly during the period between ingestion of DES and manifestation of the first diagnosable symptoms.

When Lilly notified its insurers of the DES claims filed against it, the insurers responded by adopting conflicting interpretations of the term "injury." *See Eli Lilly I*, 764 F.2d at 880. The general thrust of each insurance company's interpretation, however, was that some *other* insurance company was on the risk at the time the "injury" occurred. According to the District Court:

> In general, those insurers at risk prior to the diagnosis of DES-related diseases took the position that policies in force on the "date of manifestation" of the injury covered DES claims. Similarly, those insurers whose policies were in force on the date of manifestation of DES-related injuries took the position that policies in force on the date of ingestion of DES covered DES claims.

Mem.Op. at 5 n. * *, 5 JA 698.

By contrast, Lilly maintained that the policies should be governed by the "multiple trigger" theory: the injury

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[5] There are four basic variants on the policy provision triggering liability. One of them refers to injuries "sustained" during the policy period. 2 Joint Appendix (JA) 97. The other three refer to injuries that "occur" during the policy period. 2 JA 96, 98, 99-100. As noted in *Eli Lilly I*, the parties do not contend that these differences require different interpretations. 764 F.2d at 879.

should be understood to have "occurred" at any time between exposure to DES and manifestation of symptoms of a DES-related disease.

Lilly filed a declaratory judgment action in the District Court in March 1982. After extensive discovery, Lilly filed a motion for summary judgment in March 1983. Purporting to rely on Indiana law, the District Court granted Lilly's motion on April 12, 1984. The court held that (1) each insurer on the risk between the initial ingestion of DES and the manifestation of a DES-related disease is liable to Lilly for indemnification, (2) each insurer is liable in full once coverage under its policy is triggered, (3) Lilly can apply only one policy's limit to each injury, and (4) Lilly may select the policy under which it is to be indemnified (subject to the provisions in the policies governing allocation of liability when more than one policy covers an injury). *See* Mem. Op. at 22-23, 5 JA 715-716. The insurers appealed.

B. *The Initial Appeal to This Court*

On appeal the insurers argued that under Indiana law they should be allowed to introduce extrinsic evidence of the parties actual intent in adopting the policies, their course of conduct in applying the policies, Lilly's sophistication and strength as a bargaining partner, and the etiology of DES-related illnesses. The insurance companies therefore argued that summary judgment had been improvidently granted because there were genuine factual disputes on three material issues: (1) the authorship of the policies, (2) the actual intent of the parties on the question of multiple trigger liability, and (3) the views of medical experts on when injury actually "occurs."

In reviewing these challenges this court agreed with the District Court that the law of Indiana governs the case. A review of Indiana cases, however, suggested that the law of that state was unsettled on the question

whether extrinsic evidence is admissible to construe an ambiguous trigger provision in an insurance contract and on the issue of which interpretation a court should adopt if it did not admit such extrinsic evidence. Consequently, in an opinion issued June 18, 1985 a divided panel of this court (Wright, Tamm,[6] and Wald) certified three questions of law to the Indiana Supreme Court.[7]

C. *The Indiana Decision*

On September 12, 1985 the Supreme Court of Indiana issued its opinion responding to this court's certification. A petition for rehearing was denied on November 19, 1985, and the case was remanded to this court.

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[6] Judge Tamm would have applied this circuit's holding in *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982). Consequently, he opposed certification to the Indiana Supreme Court and filed a dissent.

[7] The three questions were:

1. Under Indiana insurance contract law, should the types of extrinsic evidence proffered by the insurers be considered in the interpretation of the disputed "trigger" provisions?

2. If any aspect of the insurers' extrinsic evidence should be considered, would Indiana courts require a determination of the parties' actual intent concerning the application of the "trigger" provision to delayed manifestation injuries? Or would Indiana courts permit a determination, after consideration of the extrinsic evidence, that the parties did not hold or convey a clear understanding of the trigger provision's applicability to delayed manifestation injuries and that, thus, the provision must be interpreted by the court as a matter of Indiana insurance law?

3. If the insurers' extrinsic evidence should not be considered, or if that evidence is not determinative of the parties' intent, how should the insurance policy provision at issue be interpreted under Indiana law? In other words, would Indiana courts adopt an exposure, a manifestation, a multiple trigger, or some other interpretation of the "injury"/"occurrence" language in Eli Lilly's policies? *Eli Lilly I*, 764 F.2d at 884-885.

The Indiana court answered two of the three questions certified by this court. First, the Indiana court held that it would not consider extrinsic evidence to determine the meaning of the trigger provisions of Lilly's insurance.[8] The court grounded this rule against admitting extrinsic evidence on two alternative rationales. First, the court cited the policy of construing ambiguous policy language against the insurer. It hinted that this interpretive policy rested, in part, on the more general rule that construction should favor the nondrafter. 482 N.E. 2d at 470. But the court also relied on the policy of construing ambiguous language in this manner because it "further[s] the policy's basic purpose of indemnity." *Id.* Finally, the Indiana court *partially* justified the policy of promoting indemnity on the basis of its tendency to conform with the "reasonable expectations" of the insured. *Id.*

The Indiana court also held that, given the trigger provisions involved in this litigation, the policies' "coverage is triggered at any point between ingestion of DES and the manifestation of a DES-related disease." *Id.* at 471 (the "multiple trigger" theory). The rationale for this rule was the same as the rationale for exclusion of extrinsic evidence: to further insurance policies' "dominant" purpose of providing indemnification. *See id.*

The only limitation the Indiana court imposed on the multiple trigger thesis was that the insurance policy must first be found to be "ambiguous" before its special rules of construction will apply. *Id.* at 470. The court, however, specifically held the language of the policies covering Eli Lilly to be ambiguous.

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[8] Having thereby answered this court's first question in this manner, the Indiana court saw no need to answer the second (*i.e.*, assuming that *some* extrinsic evidence was introduced, would Indiana courts require a determination of the parties' actual intent concerning the trigger provisions of the policies?).

Broadly stated, the insurers make three arguments as to why the Indiana opinion does not require this court to affirm the judgment of the District Court. First, appellants argue that, notwithstanding its seemingly clear holding, evidence of authorship, actual intent, and etiology is still admissible under the Indiana opinion. Second, and in the alternative, the insurers argue that if Indiana has established a rule of substantive law excluding evidence of authorship, intent, and etiology, the law is unconstitutional. Finally, a handful of the insurers argue that the District Court lacked personal jurisdiction over them and that venue was not proper in the District of Columbia. We address these arguments *seriatim.*

## II. Admissibility of Extrinsic Evidence

### A. *Admissibility of Evidence of Authorship*

Appellants contend that the Indiana court made evidence of authorship a material issue in construing insurance contracts. They read the Indiana opinion to make the insurer's authorship of a policy a necessary predicate of the general rule that ambiguities in such policies are to be construed against the insurer and, by implication, a necessary predicate of the court's conclusion that the multiple trigger interpretation should be applied here.

Appellants further argue that, although the Indiana court could determine the substantive law and thereby define the material issues in this case, that court could not determine what evidence was relevant to that issue. Issues of relevance, appellants correctly note, are to be determined under the Federal Rules of Evidence. Appellants therefore conclude that this court can and must ignore the Indiana court's statement that the insurers' evidence of authorship would be excluded under Indiana law. That ruling, they argue, is a gratuitous statement of the Indiana law of evidence. Because appellants in-

troduced evidence of Lilly's participation in drafting the trigger provision of at least some of the policies, they argue that summary judgment should not have been granted.[9]

The short answer to appellants' contentions is that the Indiana court did *not* make authorship a predicate of the general rules controlling the construction of insurance contracts or of its holdings in this case. As already noted, we read the Indiana court to have based the general rule that insurance contracts are to be construed against the insurer on three policies: assuring indemnification, fulfilling the reasonable expectations of the insured, and *contra proferentem.* 482 N.E.2d at 470. It is true that the rule that insurance contracts should be construed against the insurer is a predicate for the Indiana court's two holdings. And it is also true that the third rationale underlying this rule of interpretation—*contra proferentem*—does turn on authorship. Nonetheless, the Indiana opinion does not suggest that *each* of these rationales is a necessary predicate of the rule that a court should construe ambiguities against the insurer. The Indiana court's passing reference to the issue of authorship is therefore mere dicta.

B. *Admissibility of Evidence of Actual Expectations*

As with the Indiana court's reference to authorship, its statements concerning "expectations" merely elucidate one of the several policies underlying its holdings. As such, these statements are mere dicta. Moreover, the

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[9] The insurers argue that Lilly shared in the drafting and was responsible for the wording of several important policy provisions. *See* Joint Post-Certification Supplemental Memorandum of Defendants-Appellants filed Nov. 27, 1985 at 18. Lilly responds by arguing that, although it may have bargained for certain policy changes, it did not bargain in any substantive fashion over the terms of the trigger provision at issue in this case. *See* appellee's Post-Certification Supplemental Memorandum filed Dec. 10, 1985 at 16 n. 1.

"expectations" of which the Indiana court speaks are the *objectively* reasonable expectations of an insured. The Indiana opinion speaks of expectations that an insured "could" have had, not of the expectations it had in fact. *See id.*[10] It is also notable that the Indiana court referred to the principle of "reasonable expectations" in the context of explaining why it was going to construe insurance contracts against the insurer, as well as in the course of stating its rationale for adoption of the multiple trigger thesis. Thus, contrary to the contention of appellants, *see* Joint Post-Certification Supplemental Memorandum of Defendants-Appellants filed November 27, 1985 at 16, the Indiana court apparently did not think extrinsic evidence should be used to determine the character of such "reasonable expectations." Instead the court seemed to have determined the content of such expectations—the multiple trigger thesis—as a matter of law.[11]

C. *Admissibility of Evidence of Etiology*

The insurers argue that the Indiana court held that liability is triggered if diagnosable "injury" occurs at any point between ingestion and manifestation. They therefore argue that they had a right to introduce relevant evidence on the issue of when injury occurred.

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[10] The Indiana court adverted to such "reasonable expectations" by citing this court's opinion in *Keene Corp. v. Ins. Co. of North America, supra* note 6. In the passage in *Keene* cited by the Indiana court, this court defined "reasonable expectations" as those expectations that the insured "could have reasonably formed, as an *objective* matter, on the basis of the policies' language." 667 F.2d at 1042 n. 12 (emphasis added).

[11] Thus in the hands of the Indiana court the concept of "objectively reasonable expectations" becomes a way of emphasizing one aspect of the policy of furthering indemnification: its assurance of certainty for the insured. Although this concept is susceptible of a variety of meanings, *see* Keeton, *Insurance Law Rights at Variance With Policy Provisions*, 83 HARV. L. REV. 961 (1970), the

Appellants flatly misread the Indiana opinion. The Indiana court said that "*coverage* is triggered at any point betwen ingestion of DES and the manifestation of a DES-related disease." 482 N.E.2d at 471 (emphasis added). There is no requirement that diagnosable "injury" be shown during the time the insurer is on the risk.[12]

Appellants argue that when the Indiana court stated that "the determinative question * * * [is] when the DES-related 'injury' 'occurs' for purposes of the policies[,]" 482 N.E.2d at 469-470, it made the existence *vel non* of actual injury a material question in construing the trigger provision. Appellants fail to grasp the importance of the quotation marks around the terms "injury" and "occurs" in the Indiana court's formulation of the issue. By inserting the quotation marks the Indiana court plainly sought to signal that it understood those words to be terms of art that might well have a somewhat artificial legal meaning. If the Indiana court's phrasing of the "determinative question" is read in this manner, there is nothing surprising about its answer: coverage is triggered from the time of ingestion to the time of manifestation.

In sum, the only factual predicate of the rule that insurance contracts should be construed against the in-

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Indiana court's view is not an irrational application of that idea. Indeed, Professor (now Judge) Keeton has suggested that certain situation-specific evidence of actual intent or knowledge must be disregarded in construing the "objective" intentions of the insured. *See id.* at 967, 974-975.

[12] Ironically, the insurers seek to transform the Indiana opinion from an adoption of the *Keene* multiple trigger rule into the "injury in fact" view of *American Home Products Corp. v. Liberty Mutual Ins. Co.*, 565 F.Supp. 1485 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984). This court, however, certified this case to the Indiana court partially because it sought to clarify Indiana's view of the multiple trigger, injury in fact, manifestation, and exposure theories of liability.

surer is the requirement that the contract be ambiguous. Once that factual predicate was satisfied no quantum of evidence on the issues of authorship, intent, or etiology should have defeated a motion for summary judgment.

## III. Waiver of Constitutional Objections to the Indiana Opinion

Appellee challenges appellants' efforts to attack the constitutionality of the Indiana opinion at this stage of the proceedings. Appellee argues that these arguments should have been presented in appellants' memoranda opposing appellee's motion for summary judgment in the District Court. Appellants contend that these issues were not ripe for resolution until the Indiana court provided a definitive statement of Indiana law. We do not find appellants' argument persuasive and hold that they waived their right to challenge the constitutionality of the Indiana opinion.

Once the District Court rendered its decision,[13] a constitutional attack on its construction of Indiana law was ripe for review. In its memorandum opinion granting appellee's motion for summary judgment the District Court determined that the law of Indiana governed this case. *See* Mem.Op. at 15, 5 JA 708. It also held that

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[13] Although Lilly's arguments in the District Court did foreshadow that court's ultimate basis of decision, *see* Statement of Points and Authorities in Support of Plaintiff Eli Lilly's Motion for Summary Judgment filed March 31, 1983, 2 JA 37-42, and although appellants failed to attack the constitutionality of such a course in the District Court, *see* Statement of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment filed May 31, 1983, 2 JA 683, 748-751; Joint Supplemental Memorandum of Defendants in Opposition to Plaintiff's Motion for Summary Judgment filed Aug. 31, 1983, 4 JA 108, appellants could reasonably have thought a constitutional challenge to the implications of Lilly's thesis would be premature until there was a legal ruling focusing the issues.

an Indiana court would not admit extrinsic evidence to construe this sort of ambiguous insurance contract, *see id.* at 20, 5 JA 713, and that an Indiana court would apply the *Keene* rule. *See id* at 22, 5 JA 715. Thus all of the legal rulings that appellants find to be constitutionally offensive were stated with some precision in the District Court's memorandum opinion.

Appellants, however, failed to raise their constitutional arguments in their appeal to this court. *See* Joint Brief of Defendants-Appellants filed October 30, 1984. Nor did they bring these issues to the attention of the Indiana court before it rendered its decision. Instead, appellants raised their constitutional arguments for the first time in their petition for rehearing to the Indiana Supreme Court.[14]

The rule in this circuit is that litigants must raise their claims on their initial appeal and not in subsequent hearings following a remand. *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-1092 (D.C.Cir.1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 939, 83 L.Ed.2d 951 (1985). This is a specific application of the general waiver rule, which bends only in "exceptional circumstances, where injustice might otherwise result." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C.Cir.1984). There are no such circumstances in this case, and we see no need to create a blanket exception to the rule in *Laffey* and *Air Florida* for certification proceedings. We therefore find that appellants waived their constitutional claims by failing to raise them on their initial appeal to this court.

## IV. Personal Jurisdiction and Venue

Three of the appellant insurance companies contend that the District Court lacked personal jurisdiction over

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[14] *See* Joint Post-Certification Supplemental Memorandum of Defendants-Appellants, *supra* note 9, at 42.

them and that venue in the District of Columbia was improper.[15] These appellants are all "excess" insurers: they provide supplemental coverage under roughly the same terms as Lilly's primary insurers. Appellee contends that these appellants effectively waived such personal jurisdiction and venue objections through consent to suit clauses in their insurance policies. Alternatively, appellee argues that jurisdiction and venue were properly exercised under the applicable statutes and the Due Process Clause. We examine these arguments *seriatim*.

A. *The Consent To Suit Clause*

All three of these carriers[16] are bound by the following contractual provision:

> It is agreed that in the event of the failure of the Insurer(s) hereon to pay any amount claimed to be due hereunder, Insurer(s) hereon, at the request of the Insured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

Mutual Fire Cover Note, CN 500528, 2 JA 670. *See also* 1 JA 183 (finding of the District Court that the consent to suit clause was adopted by reference by appellants Falcon and Interstate).

Appellants raise two arguments as to why this consent to suit clause does not eradicate their jurisdiction and

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[15] The three are Falcon Insurance Company, Interstate Indemnity Company, and Mutual Fire, Marine & Inland Insurance Company.

[16] Interstate and Falcon are bound through the provision in their policies that makes them subject to the terms of the primary insurer's policy. Mutual's policy contains its own consent to suit clause that is identical to the provision reproduced in text.

venue objections. First, they argue that a court of "competent" jurisdiction must be a court that has *in personam* jurisdiction as well as subject matter jurisdiction. This argument largely reduces the consent to suit clause to a waiver of venue or *forum non conveniens*. As an initial matter, we find this reading hypertechnical, given that in many jurisdictions it is difficult to distinguish the outer perimeter of venue and *in personam* jurisdiction.[17] Moreover, by its terms the clause requires the insured to do what is necessary to "give such Court jurisdiction." Although it is hardly clear just what that phrase means, it is certain that it does *not* refer to the collusive creation of subject matter jurisdiction. It therefore presumably refers to *in personam* jurisdiction and constitutes an implicit promise to consent to the exercise of such jurisdiction.

On the other hand, it would seem that if the term "competent" in the consent to suit clause is reduced to consent to subject matter jurisdiction, that term would be mere surplusage. Because parties could never "consent" to suit by a court that *lacked* subject matter jurisdiction, it must be assumed that *any* consent to suit would implicitly constitute consent to suit in a court that had subject matter jurisdiction. Under this reading the term "competent" would only be added to the consent to suit clause if the parties felt a need to specify that they had only consented to suit in courts that were already able to exercise personal jurisdiction over them.

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[17] *Compare Du-Al Corp. v. Rudolph Beaver, Inc.*, 540 F.2d 1230, 1233 (4th Cir. 1976) (implicitly equating the two tests); *Houston Fearless Corp. v. Teter*, 318 F.2d 822, 826 (10th Cir. 1963) (expressly equating the two tests), *with Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 954 (1st Cir. 1984) (finding that the outer limits of the "doing business" provision of the federal venue statute are defined by the dormant Commerce Clause, not the Due Process Clause). *See also* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3811 at 117-130 (1986) (criticizing the Commerce Clause test).

Accepting that the term "competent jurisdiction" may be ambiguous in this context, we must construe that term in accordance with Indiana law. As already noted, the general rule of construction in Indiana is that ambiguous terms in insurance contracts are to be construed against the insurer. Under this rule it would seem that the contractual waiver of jurisdictional objections should be read broadly to include waiver of personal jurisdiction as well as a waiver of any venue objections.[18]

Appellants' second argument is that this provision is only operative after presentation of a claim by the insured to an insurer and a default by the insurer on its obligations to the insured. Appellants' obligations as excess insurers are not triggered until the primary policy limits have been exhausted. Because the primary insurers have failed to honor Lilly's claims during the pendency of this litigation, the excess insurers assert that they have not yet had occasion to default on their obligations and therefore that a condition precedent of their consent to suit has yet to be fulfilled.

Appellant Interstate, however, failed to raise the question of the condition precedent during the proceedings before the District Court.[19] It cannot raise it here at

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[18] We also note that the Indiana rule, announced in *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985), that extrinsic evidence of actual intent is inadmissible applies to this issue. Therefore we have no occasion to remand the case for factual findings by the District Court on the parties' actual intent concerning the scope of the consent to suit clause.

[19] Interstate failed to raise the issue in its arguments during the pendency of its motion to dismiss, *see* Memorandum of Law in Support of Motion to Dismiss by Defendant Interstate Indemnity Company, 1 JA 122-128; Reply of Interstate Indemnity Company to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, 1 JA 172-179. It is true that in its subsequent Answer to appellee's Complaint for Declaratory Judgment appellant Interstate did aver "a failure of conditions precedent to insurance *coverage* * * *." (Emphasis added.) This statement, listed as Interstate's

this late date. *See District of Columbia v. Air Florida, Inc., supra,* 750 F.2d at 1084-1085. We therefore find the consent to suit clause fully operative as to appellant Interstate and affirm the District Court's order denying its motion to dismiss appellee's complaint for want of personal jurisdiction or venue.

Appellants Falcon and Mutual, however, did raise the issue of the condition precedent before the District Court.[20] Appellee argues that under the law of Indiana conditions precedent are waived by an "anticipatory breach," *i.e.*, by an insurer's repudiation of its liability under the policy. This is a correct statement of Indiana law. *See McNall v. Farmers Insurance Group,* 181 Ind.App. 501, 392 N.E.2d 520, 523 (Ind. 1979); *Ohio Farmers Ins. Co. v. Vogel,* 166 Ind. 239, 76 N.E. 977, 978 (1906).[21] Unfortunately, the law of Indiana does

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"Seventh Defense," was not linked to Interstate's jurisdiction and venue objections (its "Fourth Defense"). If this general reference to "conditions precedent" was intended to amend the rather detailed arguments raised by Interstate on the jurisdictional issue, Interstate should have expressed this point with greater specificity.

[20] *See* Reply to Plaintiff's Opposition to Motions to Dismiss by Defendants Mutual Fire, Marine & Inland Insurance Company and Falcon Insurance Company at 4-6 (July 26, 1982).

[21] Appellants rely on dicta in *China Union Lines v. Amercian Marine Underwriters, Inc.,* 458 F.Supp. 132, 136 (S.D.N.Y. 1978), to the effect that a consent to suit clause is only triggered upon an actual default, not upon a mere anticipatory breach. The issue in *China Union* was whether a consent to suit clause constituted a waiver of an arbitration clause in the same contract. The court stated that it was not inclined to read the consent to suit clause as a waiver of the arbitration clause, in light of the strong federal policy favoring arbitration. *See* 9 U.S.C. § 4 (1982). Thus, although the *China Union* opinion does contain broad dicta on the inadequacy of an anticipatory breach to trigger a consent to suit clause, such dicta is best read in light of the court's concern to accommodate a particular federal policy, a policy that is not applicable to this case. Moreover, the *China Union* court did not purport to construe the law of Indiana, the law that controls our construc-

not appear to define the term "anticipatory breach" with precision. Nor does it indicate whether anticipatory repudiation will waive *all* conditions precedent or only those conditions that remain in effect after the innocent party has substantially performed. But whatever the rule in Indiana, it appears that there was a failure of the condition precedent in the consent to suit clause as to appellant Mutual.

Prior to the District Court's ruling on the question of personal jurisdiction, Mutual had failed to take a specific position on the trigger provision of its policies.[22] Thus as to Mutual it is clear that there was no repudiation of liability. Although this may have generated some uncertainty for appellee Lilly, we cannot find that such uncertainty was enough to nullify a bargained-for condition precedent.

Appellant Falcon presents a harder case. Unlike Mutual, Falcon had adopted a specific view of the trigger clause: the manifestation theory.[23] Falcon issued policies to Lilly from 1960 to 1968. Lilly may still be seeking indemnification for claims based on illnesses that first

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tion of the insurance policy at hand and requires us to apply the rule that an anticipatory breach waives conditions precedent.

[22] *See* Defendant Mutual Fire, Marine & Inland Insurance Company's Response to Plaintiff's Third Set of Interrogatories, Answers to Interrogatories Nos. 27-29 (June 2, 1983). Mutual merely stated that its interpretation "differs from that advanced by Lilly * * *." Given the variety of interpretive theories attending such contracts, the mere fact that an insurer might dispute the view of the insured would not, without more, automatically lead to the conclusion that the insurer had repudiated its obligations. Mutual may simply be maintaining a consistent litigation position here, knowing that it would ultimately have to pay Lilly, because it was intent on disputing its liabilities under similar trigger provisions included in other policies.

[23] *See* Defendant Falcon Insurance Company's Response to Plaintiff's Third Set of Interrogatories, Answer to Interrogatories Nos. 27-29 (June 2, 1983).

became manifest before 1968, during the time Falcon would be liable to Lilly even under a manifestation theory. Thus on the facts before us it is simply not possible to determine whether Lilly might only present Falcon, as its excess insurer, with a set of claims that qualified under the manifestation theory.[24]

Ordinarily we would remand this issue for further determinations by the District Court. But given the clear failure of the condition precedent as to appellant Mutual's consent to suit we must, in any event, reach the issue of whether due process allowed the District Court to exercise personal jurisdiction under the District of Columbia long arm statute. Because we find that personal jurisdiction was properly exercised under that statute, we find no need to consume additional judicial resources through a remand.

B. *D.C. Long Arm Statute and Due Process*

The D.C. long arm statute, 13 D.C.Code § 423(a)(3) (1981 & 1985 Supp.), provides for jurisdiction over any person who contracts to insure any "risk * * * within the District of Columbia at the time of contracting." Appellee contends that the risk against which it insured here was the risk of liability arising from the use of its products, and that this risk existed wherever its products were used, including the District of Columbia. *See* supplemental brief of appellee filed December 13, 1984 at 15. We find appellee's reading of the D.C. long arm statute

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[24] We do not suggest that it is impossible or even unlikely that Falcon's position did effectively amount to a repudiation; we are simply unwilling to take that step absent more elaborate findings by the District Court on the likely effect of this position on Falcon's obligations. Although the District Court did find that the insurers had taken a position that "generally" would minimize their liability, *see* Mem. Op. at 5 n. **, 5 JA 698, such a broad finding does not speak to the narrow question whether Falcon's adoption of the manifestation theory would necessarily have resulted in a repudiation of its obligations in this case.

to be natural and persuasive. Although we must apply the D.C. long arm statute in this case, *see Gatewood v. Fiat, S.p.A.*, 617 F.2d 820, 822 n. 3 (D.C.Cir. 1980), we can only apply that statute in a manner consistent with the Due Process Clause. *See Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984).

The touchstone of our due process inquiry is whether it would have been "foreseeable" that the excess insurers would be "haled into court" in the District of Columbia. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). Given the specific relationship between appellants and appellee in this case, we have little difficulty finding that such a result was in fact quite foreseeable.

Appellants knew that their insured, Lilly, distributed its products nationwide. They therefore were aware that *Lilly* was likely to be sued in any jurisdiction in the nation, including the District of Columbia. Moreover, as Lilly's insurers, appellants were aware that if Lilly was sued it was likely to attempt to implead appellants if a dispute arose over their duty to indemnify or defend. *Cf., e.g., Porter v. American Optical Corp.*, 641 F.2d 1128, 1131 (5th Cir.), *cert. denied*, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981) (asbestos manufacturer's insurers named as third-party defendants in products liability suit). In such an eventuality it would be completely foreseeable that the insured would successfully hale the insurance company into court.

The likelihood of impleader actions is not the sole reason for considering the contacts of the insured with a forum state in determining the foreseeability of an insurer being haled into court in that jurisdiction. Insurers must carefully gauge the riskiness of the products they insure. In determining the scope of the risk they have insured, insurers must consider the scale on which its insured has distributed a potentially dangerous product. The broader the distribution the greater the risk—

and presumably the higher the premium. Thus insurers cannot be said to have failed to avail themselves, in a conscious and deliberate manner, of the benefits of doing business in those fora in which the insured manufacturer distributes its products. Moreover, an insurer has a commercial interest in knowing how, and to what degree, an insured manufacturer has contacts with a forum state.

The commercial interest of the insurer in knowing of the contacts of its insured with the forum state provides the rationale for the First Circuit's rule that an insurer should foresee being sued in a jurisdiction where its insured has substantial contacts. Thus in *American & Foreign Ins. Ass'n v. Commercial Ins. Co.*, 575 F.2d 980, 982 (1st Cir. 1978), the court found that a products liability insurer was subject to personal jurisdiction where (1) the insured had shipped its products into the forum state, and (2) the terms of the policy "assured full knowledge of both the volume of export sales [and] the actual location of the customers." In *Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 669 (1st Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1350, 67 L.Ed.2d 336 (1981), the First Circuit indicated that the lack of an *explicit* understanding between the insurer and insured indicating that the insurer knew of the insured's contact with the forum state did not bar the exercise of *in personam* jurisdiction where the insurer plainly knew that the insured was likely to have substantial contacts with the forum. In this case there can be no question but that Eli Lilly's insurers were aware of the nation-wide scope of Lilly's product distribution. They cannot now claim that it was somehow unforeseeable that they would be haled into court in a jurisdiction where Lilly would likely be subject to suit.[25]

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[25] Appellants' situation is therefore distinguishable from that of the manufacturer in *Hughes v. A.H. Robins Co.*, 490 A.2d 1140, 1150-1151 (D.C. C.A. 1985). In that case the District of Columbia Court of Appeals found that due process was not satisfied where

C. *Venue*

Under 28 U.S.C. § 1391(c) (1982) venue is proper in any forum state where a corporation is "doing business." In *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant*, 760 F.2d 312 (D.C.Cir. 1985), this court adopted this construction of the doing business test:

> "[D]oing business" in a district for the purposes of § 1391(c) [should be] read to mean engaging in transactions there to such an extent and of such a nature that the state in which the district is located *could* require the foreign corporation to qualify to "do business" there.

*Id.* at 316 n. 7 (*quoting Johnson Creative Arts, supra*, 743 F.2d at 954) (brackets & emphasis in original)).

Consistent with this view, a corporation is "doing business" under Section 1391(c) whenever the Constitution would permit a state to require a foreign corporation to comply with a licensing scheme. *See Johnson Creative Arts, supra*, 743 F.2d at 954.

Appellants Mutual and Falcon both allocated premiums to policies sold in the District of Columbia.[26] Such

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the manufacturer had only done substantial business within the forum on an intermittent basis and the cause of action did not arise from such contacts within the forum. *See also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-415, 104 S.Ct. 1868, 1872-1873, 80 L.Ed.2d 404 (1984). Here the "contacts" of the insurers are much more substantial because they include the decision to insure a manufacturer that distributed products in the forum state. Even in non-insurance cases the activities of various middlemen may be relevant to an evaluation of the contacts of the defendant with the forum state. *See, e.g., Coulter v. Sears, Roebuck & Co.*, 426 F.2d 1315, 1318 (5th Cir. 1970) (court could exercise personal jurisdiction over third-party defendant manufacturer where manufacturer sold products to Sears with knowledge that Sears would ship a substantial number to forum state). It is particularly appropriate, however, when evaluating the contacts of a products liability insurer with the forum state to consider its relationship with its insured and the insured's contacts with the forum state.

[26] *See* Affidavit of Paul D. Dooley (June 14, 1982) (for appellant Mutual), 1 JA 116-117; Affidavit of Ross C. Cowan (June 14, 1982)

policies were sold by independent brokers; neither appellant maintained an office in the District or had employees in the District. It is clear that the District of Columbia *could* impose such a burden on foreign excess insurers before independent brokers could sell their policies. Such practices are common in other jurisdictions without being upset by constitutional challenge.[27] *See, e.g.*, Md.Code Ann. Art. 48A, § 190 (1979 & 1985 Supp.). *See also* Schwing, *A Comparative Analysis of the Qualification Requirements Applicable to Alien Stock Insurers, to Surplus Line Insurers, and to Reinsurers*, INS.L.J. 649, 674-678 (November 1976). Thus it would seem that under the *Noxell/Johnson* test venue was proper in the District of Columbia.

## V. Conclusion

Authorship, intent, and etiology are not material issues under Indiana law, and evidence bearing on such issues was rightly excluded. As the District Court held, any insurer on the risk between the time of ingestion and the manifestation of symptoms has a duty to indemnify appellee. The District Court's grant of appellee's motion for summary judgment is therefore affirmed. We also find the appellant excess insurer's personal jurisdiction and venue arguments to be ultimately unpersuasive. We therefore also affirm the District Court's order denying these appellants' motion to dismiss.

*Affirmed.*

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(for appellant Falcon), 1 JA 118-120. The record does not reveal any similar business contacts by appellant Interstate. But because we find that the consent to suit clause was fully operative against Interstate, we hold that Interstate effectively waived its venue objections as well as its personal jurisdiction objections.

[27] Indeed, the Supreme Court has read the passage of the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011 (1982), as a removal of all dormant Commerce Clause limitations on the power of the states to regulate insurance. *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 653-655, 101 S.Ct. 2070, 2075-76, 68 L.Ed.2d 514 (1981).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1985

CA No. 82-00669

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No. 84-5391

ELI LILLY AND COMPANY

v.

THE HOME INSURANCE CO., *et al.*

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And Consolidated Case Nos. 84-5394, 84-5395, 84-5396, 84-5397, 84-5398, 84-5399, 84-5400, 84-5401, 84-5402, 84-5403, 84-5404, 84-5405, 84-5406 and 84-5407

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[Filed Aug. 29, 1986]

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Before: EDWARDS and SCALIA, *Circuit Judges*; WRIGHT, *Senior Circuit Judge*

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ORDER

Upon consideration of the petitions for rehearing of the Insurers and of Falcon Insurance Company and Mu-

tual Fire, Marine and Inland Insurance Company, and of the joinders therein, it is

ORDERED, by the Court, that the petitions for rehearing are denied.

*Per Curiam*

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 82-0669

ELI LILLY AND COMPANY,
*Plaintiff*,

v.

THE HOME INSURANCE COMPANY, *et al.*,
*Defendants.*

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[Filed Oct. 5, 1982]

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ORDER

Upon consideration of the motions to dismiss for lack of *in personam* jurisdiction and improper venue filed by defendants Interstate Indemnity Company; Falcon Insurance Company (formerly Commercial Union Surplus Lines Insurance Company); and Mutual Fire, Marine, and Inland Insurance Company, supporting memoranda thereof, and plaintiff's opposition thereto, it is by the Court this 5th day of October, 1982,

ORDERED that the motions by Interstate Indemnity Company; Falcon Insurance Company; and Mutual Fire, Marine, and Inland Insurance Company to dismiss this action as to them pursuant to Fed. R. Civ. P. 12(b)(2) and 28 U.S.C. § 1391(a) and (c) be, and are hereby, denied.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge